Tan Hong Kiang v Lena Ling Swee Yee (appointed personal representative of the estate of Wong Teck Kiat (deceased))

HIGH COURT (SIBU) — ORIGINATING SUMMONS NO BTU-24–10/7 OF 2014
LEE HENG CHEONG J
29 DECEMBER 2014

Land Law — Caveats — Private caveats — Removal of — Caveatable interest — Caveat lodged against land to secure money lent money to defendant — Whether plaintiff had caveatable interest — Elements to be established for caveat to be maintained — Mere personal claim not related to the land — Application to stay caveat dismissed — Sarawak Land Code (Cap 81) ss 173, 177 & 178

This was the plaintiff's application to stay the caveat ('the said caveat') lodged against the defendant's land ('the said land'). The plaintiff had lodged a caveat against the said land, grounded on a statutory declaration wherein it was stated that the plaintiff had lent money to the defendant. In payment thereof, Eastern Pillars Sdn Bhd ('the company') and Syarikat Iskandar Rama had issued to the plaintiff cheques amounting to RM680,000 and the said cheques were dishonored, upon being banked in.

Held, dismissing the application with costs:

(1) In an application under ss 177 and 178 of the Sarawak Land Code ('Code'), the onus is on the caveator to satisfy the court that he has a caveatable interest in the said land failing which the caveat must be removed. It is clear that if a caveator wishes to maintain the caveat, he must satisfy the followings namely: (a) whether the material stated in the caveat disclosed any caveatable interest; (b) if there is caveatable interest disclosed in the caveat the caveator must show by the affidavits evidence that there is a serious question to be tried; and (c) the question of balance of convenience or balance of justice (see paras 3 & 8); *Medan Juta Sdn Bhd v Tsoi Ping Kwan* [1996] 1 MLJ 864 referred.

(2) The statutory declaration did not show that the plaintiff had any caveatable interest in the said land as the statutory declaration did not state that the said land was to be utilised as a security and/or charge to the plaintiff for the said loan (see para 10).

(3) In the summons, the loan was said to be advanced to the said company. The statutory declaration averred that the loan was made by the plaintiff to the defendant herein. But this was not pleaded. Hence, no nexus was

shown between the loan and the said land. The statutory declaration therefore did not show that the plaintiff had any caveatable interest in the said land (see paras 11–12); *Goh Keng How V Raja Zainal Abidin Bin Raja Hussin & Anor* [1995] 3 MLJ 6 referred.

(4) The plaintiff had no interest in land created within the meaning of s 173 of the Code (see para 13); *Standard Chartered Bank v Yap Sing Yoke & Ors* [1989] 2 MLJ 49 referred.

(5) The plaintiff's claim was a personal claim for money owed by the defendant to the plaintiff and was not related to the said land (see para 15).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif untuk menangguhkan kaveat ('kaveat') yang dimasukkan terhadap tanah defendan ('tanah'). Plaintif telah memasukkan kaveat terhadap tanah tersebut, berdasarkan perisytiharan statutori di mana ia dinyatakan bahawa plaintif telah meminjamkan wang kepada defendan. Dalam bayaran kepadanya, Eastern Pillars Sdn Bhd ('syarikat') dan Syarikat Iskandar Rama telah mengeluarkan kepada plaintif cek-cek bernilai sebanyak RM680,000 dan cek-cek tersebut tidak sahlaku, apabila dibankkan.

Diputuskan, menolak permohonan dengan kos:

(1) Dalam permohonan di bawah ss 177 dan 178 Kanun Tanah Sarawak ('Kanun'), beban adalah di atas pengkaveat untuk memuaskan mahkamah yang dia mempunyai kepentingan kaveat dalam tanah tersebut jika gagal kaveat mesti dipotong. Adalah jelas bahawa jika pengkaveat ingin mengekalkan kaveat, dia mesti memenuhi berikutnya iaitu: (a) sama ada material yang dinyatakan dalam kaveat mendedahkan apa-apa kepentingan kaveat; (b) jika kepentingan kaveat didedahkan dalam kaveat pengkaveat mesti menunjukkan dengan keterangan afidavit bahawa terdapat persoalan serius untuk dibicarakan; dan (c) persoalan imbangan kesenangan atau imbangan keadilan (lihat perenggan 3 & 8); *Medan Juta Sdn Bhd v Tsoi Ping Kwan* [1996] 1 MLJ 864 dirujuk.

(2) Perisytiharan statutori tidak menunjukkan bahawa plaintif mempunyai apa-apa kepentingan kaveat dalam tanah tersebut memandangkan perisytiharan statutori tidak menyatakan bahawa tanah tersebut digunakan sebagai jaminan dan/atau caj kepada plaintif untuk pinjaman tersebut (lihat perenggan 10).

(3) Dalam saman tersebut, pinjaman dikatakan diberikan kepada syarikat tersebut. Perisytiharan statutori menegaskan bahawa pinjaman dibuat oleh plaintif kepada defendan. Tetapi ini tidak diplidkan. Maka, tiada neksus ditunjukkan di antara pinjaman dan tanah tersebut. Perisytiharan

statutori oleh itu tidak menunjukkan bahawa plaintif mempunyai apa-apa kepentingan kaveat dalam tanah tersebut (lihat perenggan 11–12); *Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 6 dirujuk.

(4) Plaintif tidak mempunyai kepentingan dalam tanah yang dibentuk dalam maksud s 173 Kanun (lihat perenggan 13); *Standard Chartered Bank v Yap Sing Yoke & Ors* [1989] 2 MLJ 49 dirujuk.

(5) Tuntutan plaintif adalah tuntutan peribadi untuk wang yang dihutang oleh defendan kepada plaintif dan bukan berkaitan tanah tersebut (lihat perenggan 15).]

Notes

For cases on private caveat, see 8(2) *Mallal's Digest* (5th Ed, 2015) paras 2707–2710.

Cases referred to

Abdul Rahim v Vallapai Shaik [1987] 2 MLJ 700, SC (refd)
Dusun Desaru Sdn Bhd (No 2) & Anor v Wang Ah Yu & Ors [2000] MLJU 609, HC (refd)
Eng Mee Yong & Ors v V Letchumanan [1979] 2 MLJ 212, PC (refd)
Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor [1995] 3 MLJ 6, HC (folld)
Grandivision Enterprise Sdn Bhd v Ng Siok Hooi (P) [2008] 3 MLJ 436, HC (folld)
Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd [1992] 1 MLJ 263, SC (refd)
Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719, CA (refd)
Mahadevan & Anor v Patel [1975] 2 MLJ 207; [1975] 1 LNS 95, FC (distd)
Medan Juta Sdn Bhd v Tsoi Ping Kwan [1996] 1 MLJ 864, HC (refd)
Standard Chartered Bank v Yap Sing Yoke & Ors [1989] 2 MLJ 49, HC (refd)
Wong Kuan Tan v Gambut Development Sdn Bhd [1984] 2 MLJ 113, FC (refd)
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin [1997] 2 MLJ 487, CA (refd)

Legislation referred to

Sarawak Land Code (Cap 81) ss 173, 177, 178, 323(1)(b)

Jacqueline Hii (Spring Advocates) for the plaintiff.
Lai Chee Hua (Wan Ullok Jugah Chin & Co Advocates) for the defendant.

Lee Heng Cheong J:

INTRODUCTION

[1] This is the plaintiff's application to stay the caveat ('the said caveat') affecting Lot 1113 Block 31 Kemena Land District ('the said land') lodged against the defendant's land on the ground of an loan granted to the defendant, payment of the said loan by way of cheques by one company, Eastern Pillars Sdn Bhd ('the said company') and an impending civil suit against the defendant and the company filed in Sibu Sessions Court vide Suit No SBW B52NCvC-4 of 2014.

[2] The followings cause papers are referred to:

(a) originating summons dated 24 July 2014;

(b) affidavit-in-support affirmed by Tan Hong Kiang on 24 July 2014 ('Tan Hong Kiang's first affidavit');

(c) affidavit-in-opposition affirmed by Lena Ling Swee Yee on 15 August 2014 ('Lena Ling's first affidavit');

(d) affidavit-in-reply affirmed by Tan Hong kiang on 3 September 2014, ('Tan Hong Kiang's second affidavit'); and

(e) affidavit-in-opposition (II) affirmed by Lena Ling Swee Yee on 12 September 2014 ('Lena Ling's second affidavit').

RELEVANT LAWS AND PRINCIPLES

[3] In an application under ss 177 and 178 of the Sarawak Land Code, the onus is on the caveator to satisfy the court that he has a caveatable interest in the said land failing which the caveat must be removed.

[4] In *Abdul Rahim v Vallapai Shaik* [1987] 2 MLJ 700, the Supreme Court through Hashim Yeop A Sani SCJ said at p 700 as follows:

> The learned judge was apparently of the opinion that since a number of issues had been raised relating to the rights and interests of the different parties to the property it would only be right and proper that the caveat should be allowed to remain until the determination of such rights and interests. We disagreed and allowed the appeal.

At p 701 His Lordship said:

> Many issues were raised before the learned judge and also before us appeal. *In our opinion for the purpose of the application before the learned judge all that the court need apply is the principle as stated by Lord Diplock in the landmark case of Eng Mee Yong & Ors v V Letchumanan (1) that in application under* s 327 of the National Land Code *the caveator must first satisfy the court that on the evidence presented his claim to an*

interest in the property does raise a serious question to be tried ; and, having done so, he must go on to show that the balance of convenience is in favour of the status quo until the trial of the action.

(Emphasis added.)

[5] Further guidance can found in the following cases:

(a) *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212:

(b) *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263;

(c) *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719; and

(d) *Wu Shu Chen (Sole Executrix of the estate of Goh Keng How, deceased) & Anor v Raja Zainal Abidin bin Raja Hussin* [1997] 2 MLJ 487.

[6] In the textbook, *Caveats under Sarawak Land Code (Cap 81)*, the learned author BC Bong said at pp 5–6 stated as follows:

In the majority of cases that came before the court for the removal or extension of caveats the sole question centres on whether the caveator has an interest in land within the meaning of s 173. *The court should not concern itself with other considerations not relevant to the issue of whether a caveatable interest exists. Thus in Guardian, Trust, And Executors Company of New Zealand, Limited v Hall* [1938] NZLR 1020 CA the appellate court reversed a decision of the lower court in dismissing an application for removal of a caveat. *The lower court dismissed an application on the ground that there was an appeal pending on other litigation which might or might affect the position and that the outcome of that appeal would be delayed only for a few weeks. It was held by the appellate court that was not sufficient and that it was not enough to show that the lodging and continued existence of the caveat would be in some way advantageous to the caveator. He must bring himself within the statutory provision which requires him to establish that he has a caveatable interest.*

(Emphasis added.)

[7] In the case of *Medan Juta Sdn Bhd v Tsoi Ping Kwan* [1996] 1 MLJ 864 in following the cases of *Luggage Distribution (M) Sdn Bhd* and *Murugappa Chettiar, Lakshmanan*, the court held, inter alia, as follows:

(1) in order to determine whether a caveat could be sustained, three question must be asked: (i) whether the caveator has disclosed a caveatable interest in his application under S 323(1) of the Code; (ii) if he has established a caveatable interest, then, whether the evidence produced in support of his claim disclosed a serious question to be tried; and (iii) if both question were resolved in the caveator's favour, then whether the balance of convenience or justice lay in favour of the caveat remaining on the register pending the disposal of his suit.

Further it was held in the same case as follows: 'the dispute was, in effect in this case, one between the defendant and J as an individual in relation to the shares owned by J in the plaintiff, and not between the plaintiff and the defendant in relation to the land. Thus the defendant should pursue his remedies against J personally arising out of a creditor-debtor relationship ... therefore, the defendant, as caveator, had not discharged the onus of proving that he was beneficially entitled under any trust affecting the land or interest as contained in s 323(1)(b) he has no caveatable interest and the caveats would accordingly be removed'.

[8] From the above cases and authorities, it is clear that if a caveator wishes to maintain the caveat, he must satisfy the followings namely:

(a) whether the material stated in the caveat disclosed any caveatable interest;

(b) if there is caveatable interest disclosed in the caveat the caveator must show by the affidavits evidence that there is a serious question to be tried; and

(c) the question of balance of convenience or balance of justice.

CONSIDERATION OF THE APPLICATION

[9] The plaintiff lodged a caveat against the said land, grounded on a statutory declaration (exh 'TKH-3' annexed to the affidavit-in-support of Tan Hong Kiang affirmed on 24 July 2014) ('the said statutory declaration') wherein it stated, inter alia, that the plaintiff lent and advanced money to the defendant and that in payment thereof, Eastern Pillars Sdn Bhd and Sykt Iskandar Rama have issued to the plaintiff, cheques amounting to RM680,000 and the said cheques were dishonored, upon being banked in.

[10] This court finds that that the said statutory declaration did not show that the plaintiff has any caveatable interest in the said land as the said statutory declaration did not state that the said land was to be utilised as a security and/or charge to the plaintiff for the said loan.

[11] In any event, from this court's perusal of exh 'THK-7', annexed to the affidavit-in-support of Tan Hong Kiang affirmed on 24 July 2014, which is a summons filed in the Sessions Court, Sibu against the Wong Teck Kiat, this court finds that from the said summons, the loan was advanced to the said company. Even though the said statutory declaration averred that there was an loan made by the plaintiff to the defendant herein, this was not pleaded in the said exh 'THK-7' above. It did not show that there was any nexus between the loan and the said land. Thus this court finds that the said statutory declaration did not show that the plaintiff has any caveatable interest in the said land.

[12] This court is guided by the case of *Goh Keng How v Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 MLJ 6, where the court there, held as follows:

> Goh's statutory declaration did not state the nature of the claim on which his application was based and he had failed to verify it. Thus, the ground stated in Goh and Ho's applications were insufficient in law to support the caveat and they had to be removed forthwith

[13] This court also finds that plaintiff has no interest in land created within the meaning of s 173 of the Sarawak Land Code (Cap 81). In *Standard Chartered Bank v Yap Sing Yoke & Ors* [1989] 2 MLJ 49, the court held, inter alia, as follows;

> when the second defendant lodged caveat on 11 June 1985 after obtaining a judgment in default against the first defendant, had no interest whatsoever upon which to base his claim to the land. The judgment in default was a judgment on a claim for goods sold and delivered. Of course he had filed a suit against the first defendant for goods sold and delivered but that too had no concern with land and even then there was no judgment as yet at the time of lodging of the caveat. In other words, the second defendant had no caveatable interest in the land on 11 June 1985 ...

[14] This court agrees with the contention of the defendant that the commencement of a civil suit against the defendant and Eastern Pillars Sdn Bhd in the Sessions Court, Sibu, Sarawak based on the said loan, does not entitled the plaintiff to lodge a caveat and maintain the status quo of the said land and to prevent further dealing in the same pending determination of the said dispute between the plaintiff and the defendant and Eastern Pillars Sdn Bhd in the sessions court.

[15] The plaintiff's claim herein is a personal claim for money owed by the defendant to the plaintiff and is not related to the said land. This court is guided by the case of *Grandivision Enterprise Sdn Bhd v Ng Siok Hooi (P)* [2008] 3 MLJ 436, where the court held, inter alia, as follows:

> the claim of the defendant was for 2/7 profit. The claim was a personal claim or an in personam claim. Following the authorities, a claim for profit is not a registrable interest under s 323(1)(a) of the NLC. The defendant's claim was obviously an in personam claim and therefore had no caveatable interest.

[16] Further support can be found in *Dusun Desaru Sdn Bhd (No 2) & Anor v Wang Ah Yu & Ors* [2000] MLJU 609, where the court held, inter alia, as follows:

> ... it (s 323 of the NLC) set out the categories of person or bodies who may enter private caveats. Precisely put, not every person or body can enter a private caveat; only a person or body having a caveatable interest in the land is entitled to lodge a private caveat. It is a correct statement of the law to state and I so state that a person

or body who enters a private caveat must claim title to, or any registrable interest in the land or any right to such title or interest ...

... seen in its correct prospective and applying the Torres principles, the phrases 'title to' and 'registrable interest' as employed in s 323(1)(a) of the NLC would refer to the following scenarios:

(i) a claim to an ownership of the land as envisaged in the case of *Muna v Fatimah* [1968] 1 MLJ 54 and this kind of claim is capable of being protected by a private caveat; and

(ii) a claim to a registrable interest which is capable of being protected by a private caveat.

A personal claim or better known as an in personam claim is enforceable against the registered proprietor and not the land itself and consequently it is not caveatable. In rem claim which relates to an interest capable of registration can be caveated. (see *Bachan Singh v Mahinder Kaur & Ors* [1956] MLJ 97).

(Emphasis added.)

[17] In *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 wherein the Federal Court held that:

(2) The appellant did not have a 'caveatable interest' in the land.

(a) The expression 'interest' in cl 4(a) of the deed of assignment was regarding an unsecured civil debt and did not come within the meaning of 'interest' in s 320(1) of the Code. The right given in cl 4(a) was contractual right which did not create an 'interest' within the meaning of s 323 of the Code. It did not amount to an equitable or other interest sufficient to support a caveat ...

Thus this court finds that the grounds stated in the said caveat, are insufficient to support a caveat and the plaintiff has no caveatable interest in the said land.

[18] This court finds and holds that the authorities citied and relied upon by the plaintiff, are not relevant to the present case as those authorities can be distinguished from the present case. As regards the case of *Mahadevan & Anor v Patel* [1975] 2 MLJ 207; [1975] 1 LNS 95, the issue there was whether the money paid to the appellant for the purchase of the five parcels of land was from the respondent, the managing director of the company or the company itself and the Federal Court held that the managing director acting throughout on behalf of the company has a caveatable interest in the land as there was an intention of the parties to purchase the land or to charge the land as security for the money paid to the defendant. In the present case, the fact of the present case showed it was purely an alleged personal lending transaction, repayment secured by cheques of the said company and is not related to the said land.

[19] This court agrees with the defendant's contention that the authorities cited and relied upon by the plaintiff, have no relevancy to the present case and can be distinguished.

[20] In the light of this court's above findings, this court finds that the plaintiff has failed to show that the material stated in the caveat disclosed any caveatable interest, failed to establish that he has a caveatable interest disclosed in the caveat.

ORDER

[21] In the light of this court's above findings, this court thus dismisses this originating summons with costs.

Application dismissed with costs.

Reported by Kanesh Sundrum